

1

2

3

4

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

5

6

DAVINNTERRA RICHARDSON,  
Petitioner,  
v.  
RON RACKLEY,  
Respondent.

7

8

9

10

11

Case No. [17-cv-07374-PJH](#)

**ORDER GRANTING RESPONDENT'S  
MOTION TO DISMISS AND DENYING  
CERTIFICATE OF APPEALABILITY**

Re: Dkt. No. 13

12

13

14

15

16

This is a habeas case brought pro se by a state prisoner under 28 U.S.C. § 2254. Respondent has filed a motion to dismiss on the ground that the petition is barred by the statute of limitations. Petitioner has filed an opposition. For the reasons that follow, the motion is granted.

17

**DISCUSSION**

18

**Statute of Limitations**

19

20

21

22

23

24

25

26

27

28

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposed for the first time a statute of limitations on petitions for a writ of habeas corpus filed by state prisoners. Petitions filed by prisoners challenging noncapital state convictions or sentences must be filed within one year of the latest of the date on which: (A) the judgment became final after the conclusion of direct review or the time passed for seeking direct review; (B) an impediment to filing an application created by unconstitutional state action was removed, if such action prevented petitioner from filing; (C) the constitutional right asserted was recognized by the Supreme Court, if the right was newly recognized by the Supreme Court and made retroactive to cases on collateral review; or (D) the factual predicate of the claim could have been discovered through the

1 exercise of due diligence. 28 U.S.C. § 2244(d)(1). Time during which a properly filed  
2 application for state post-conviction or other collateral review is pending is excluded from  
3 the one-year time limit. *Id.* § 2244(d)(2). The one-year period may start running from  
4 "the expiration of the time for seeking [direct] review." 28 U.S.C. § 2244(d)(1)(A).

5 Petitioner pled no contest and was sentenced on June 6, 2014. Petition at 1.  
6 Petitioner did not appeal. The conviction therefore became final 60 days later on August  
7 5, 2014, when the time for filing an appeal expired. See *Mendoza v. Carey*, 449 F.3d  
8 1065, 1067 (9th Cir. 2006) (because California prisoner did not appeal his conviction,  
9 process of direct review became final 60 days after conviction); Cal. Rule of Court  
10 8.308(a). The statute of limitations expired one year later on August 5, 2015. See 28  
11 U.S.C. § 2244(d)(1). The instant federal petition filed on December 18, 2017, is thus  
12 untimely absent tolling.<sup>1</sup>

13 Petitioner alleges that on August 14, 2017, she submitted a state habeas petition  
14 to the Alameda County Superior Court that was ignored. Petition at 13. Petitioner then  
15 filed state habeas petitions with the California Court of Appeal and California Supreme  
16 Court that were both denied. Motion to Dismiss, Ex. 1.

17 Even assuming petitioner did file a petition with the Alameda County Superior  
18 Court that was ignored, all of petitioner's state habeas petitions were filed more than two  
19 years after the expiration of the statute of limitations so she will not receive tolling. See  
20 *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003) ("[S]ection 2244(d) does not  
21 permit the reinitiation of the limitations period that has ended before the state petition was  
22 filed," even if the state petition was timely filed). Thus, this petition is untimely.

23 Petitioner also argues that she is actually innocent, which may serve as an  
24 equitable exception to the statute of limitations. In *McQuiggin v. Perkins*, 569 U.S. 383  
25 (2013), the Supreme Court ruled that a "convincing showing" of actual innocence under

---

27 <sup>1</sup> The court affords petitioner application of the mailbox rule as to all her habeas filings.  
28 *Houston v. Lack*, 487 U.S. 266, 275-76 (1988) (pro se prisoner filing is dated from the  
date prisoner delivers it to prison authorities).

1        *Schlup v. Delo*, 513 U.S. 298 (1995) can overcome the AEDPA statute of limitations. In  
2        *Schlup*, 513 U.S. at 324, the Supreme Court held that a claim of actual innocence  
3        “requires petitioner to support his allegations of constitutional error with new reliable  
4        evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts,  
5        or critical physical evidence—that was not presented at trial.” Further, “the petitioner must  
6        show that it is more likely than not that no reasonable juror would have convicted him in  
7        light of the new evidence.” *Id.* at 327. Under *Schlup*, petitioner must establish his or her  
8        factual innocence of the crime, and not mere legal insufficiency. See *Bousley v. United*  
9        *States*, 523 U.S. 614, 623 (1998); *Jaramillo v. Stewart*, 340 F.3d 877, 882–83 (9th Cir.  
10        2003).

11            The Supreme Court has stressed that the exception is limited to “certain  
12        exceptional cases involving a compelling claim of actual innocence.” *House v. Bell*, 547  
13        U.S. 518, 522 (2006). Moreover, the Ninth Circuit has noted that, because of “the rarity  
14        of such evidence, in virtually every case, the allegation of actual innocence has been  
15        summarily rejected.” *Shumway v. Payne*, 223 F.3d 982, 990 (9th Cir. 2000) (quoting  
16        *Calderon v. Thomas*, 523 U.S. 538, 559 (1998)).

17            In support of her actual innocence claim, petitioner contends that the victim initially  
18        reported to police that she did not know who attacked her but then pointed to petitioner  
19        and identified her as the assailant and that this all occurred on a busy street. Docket No.  
20        9 at 1-2. Petitioner has not presented new evidence because all of these facts were  
21        known to petitioner when she pled no contest. These allegations do not rise to the high  
22        level required to state a claim of actual innocence. See *Schlup*, 513 U.S. at 328 (noting  
23        the need to present “evidence tenably claimed to have been wrongly excluded or to have  
24        become available only after the trial”); see also *Lee v. Lampert*, 653 F.3d 929, 945 (9th  
25        Cir. 2011) (en banc) (“to pass through the *Schlup* gateway, a petitioner must show  
26        reliable evidence of his [or her] innocence that was not, and could not have been,  
27        presented at trial”) (Kozinski, C.J., concurring). The petition is dismissed as untimely.  
28

1

## CONCLUSION

2 Respondent's motion to dismiss (Docket No. 13) is **GRANTED** as discussed  
3 above. The petition is **DISMISSED**. The clerk shall close the file.

4

## APPEALABILITY

5 The federal rules governing habeas cases brought by state prisoners require a  
6 district court that enters a final order adverse to the petitioner to grant or deny a  
7 certificate of appealability ("COA") in the order. See Rule 11(a), Rules Governing § 2254  
8 Cases, 28 U.S.C. foll. § 2254.

9 A petitioner may not appeal a final order in a federal habeas corpus proceeding  
10 without first obtaining a certificate of appealability. See 28 U.S.C. § 2253(c); Fed. R.  
11 App. P. 22(b). Section 2253(c)(1) applies to an appeal of a final order entered on a  
12 procedural question antecedent to the merits, for instance a dismissal on statute of  
13 limitations grounds, as here. See *Slack v. McDaniel*, 529 U.S. 473, 483 (2000).

14 "Determining whether a COA should issue where the petition was dismissed on  
15 procedural grounds has two components, one directed at the underlying constitutional  
16 claims and one directed at the district court's procedural holding." *Id.* at 484-85. "When  
17 the district court denies a habeas petition on procedural grounds without reaching the  
18 prisoner's underlying constitutional claim, a COA should issue when the prisoner shows,  
19 at least, that jurists of reason would find it debatable whether the petition states a valid  
20 claim of the denial of a constitutional right and that jurists of reason would find it  
21 debatable whether the district court was correct in its procedural ruling." *Id.* at 484. As  
22 each of these components is a "threshold inquiry," the federal court "may find that it can  
23 dispose of the application in a fair and prompt manner if it proceeds first to resolve the  
24 issue whose answer is more apparent from the record and arguments." *Id.* at 485.  
25 Supreme Court jurisprudence "allows and encourages" federal courts to first resolve the  
26 procedural issue, as was done here. See *id.*

27 Here, the court declines to issue a COA regarding the procedural holding or the  
28 underlying claim because reasonable jurists would not find the court's findings debatable.

1 The court therefore **DENIES** a COA.

2 **IT IS SO ORDERED.**

3 Dated: July 30, 2018

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28



---

PHYLLIS J. HAMILTON  
United States District Judge

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

DAVINNTERRA RICHARDSON,  
Plaintiff,  
v.  
RON RACKLEY,  
Defendant.

Case No. 17-cv-07374-PJH

## CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on July 30, 2018, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Davinnterra Richardson ID: WE-9948  
Folsom Women's Facility  
P.O. Box 1790  
Folsom, CA 95763

Dated: July 30, 2018

Susan Y. Soong  
Clerk, United States District Court

*Kelly Collins*  
By: \_\_\_\_\_  
Kelly Collins, Deputy Clerk to the  
Honorable PHYLLIS J. HAMILTON